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NO. \_\_\_\_\_

IN THE SUPREME COURT OF THE  
UNITED STATES

OCTOBER TERM, 1986

STATE OF ALABAMA, PETITIONER

VS.

MARK MONROE GEESLIN, RESPONDENT

APPENDICIES TO THE  
PETITION FOR A WRIT OF CERTIORARI TO  
THE SUPREME COURT AND COURT OF CRIMINAL  
APPEALS OF ALABAMA

OF

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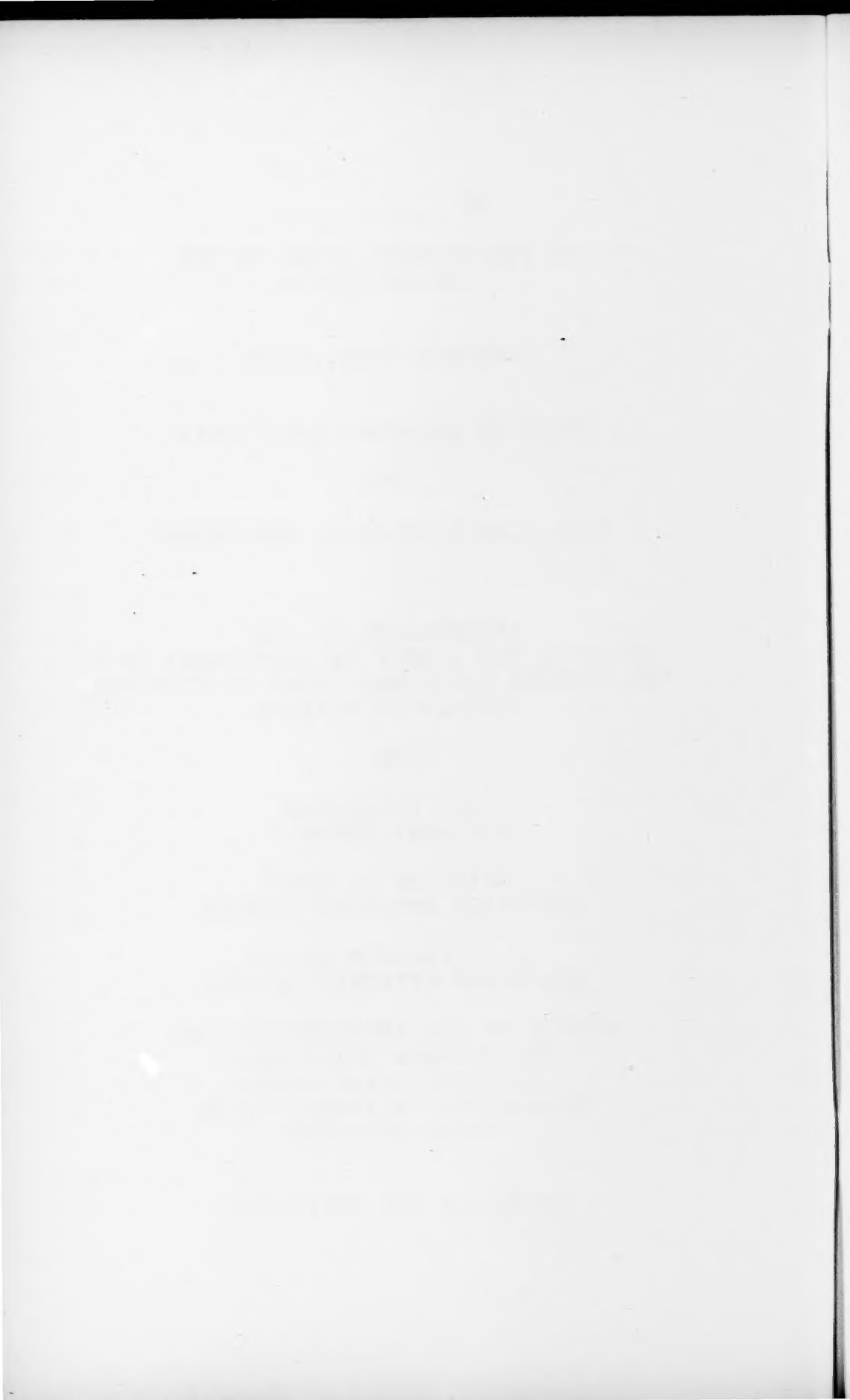
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APPENDIX "A"

January 7, 1986

THE STATE OF ALABAMA ---  
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1985-86

8 DIV. 306

Mark Monroe Geeslin

v.

State

Appeal from Madison Circuit Court

PATTERSON, JUDGE

Appellant, Mark Monroe Geeslin, was convicted of kidnapping in the first degree and rape in the first degree. See §13A-6-43 and §13A-6-61, Code of Alabama (1975). The trial court imposed a

sentence of life imprisonment in the state penitentiary for each offense, to run consecutively.

Two issues are raised on appeal, neither of which requires a detailed account of the facts. Appellant first alleges that the State failed to disclose the results of medical tests specifically requested by the defense. Secondly, it is argued that the trial court's restricting closing arguments to forty minutes violated appellant's right to due process.

# I

At trial the State produced three witnesses that placed appellant at the shopping mall where the kidnapping and rape occurred. The victim identified her assailant as a white male, approximately

5'11", 170 to 180 pounds with light brown or dark blond hair, in his mid-twenties, unshaven or with several days growth of facial hair, and wearing a dark overcoat, down to his knees, and blue jeans. The offense took place at approximately 9:00 p.m. The victim identified appellant's photo from some 25 to 30 photos supplied by the police department and picked appellant out of a lineup at the police station. A mall employee testified that she observed appellant in the mall between 8:30 and 8:40 p.m. on the night in question. Appellant was wearing a black overcoat and had approximately a two-day growth of facial hair.

Appellant's former mother-in-law and brother-in-law also testified that they observed appellant in the mall at approximately 8:25 p.m. that night and

testified that he was wearing a dark "raincoat" that fell to his knees and that he had "whiskers."

Appellant produced several witnesses who testified that appellant did not own and had never worn a long, dark coat and that appellant was clean-shaven on the evening of the kidnapping and rape. Some of these witnesses testified that they talked with appellant, by phone, between 9:30 and 10:00 p.m. that evening. Through these witnesses appellant attempted to establish that someone other than himself committed the offenses charged.

Two weeks after the trial of this cause, defense counsel learned that the victim had contracted a venereal disease as a result of the rape. Defense counsel also learned that appellant had been

tested for gonorrhea by the State twelve days after the rape occurred, and this test came back negative for gonorrhea. Appellant contends that the results of this test were never communicated to counsel or appellant and that the State therefore violated its duty to disclose exculpatory material as ordered by the trial court and in accordance with due process standards established in Brady v. Maryland, 373 U.S. 83 (1963), and A.R.Crim.P.Temp. Rule 18.1(d).

A hearing on appellant's motion for new trial was held on March 28, 1985. At this hearing Assistant District Attorney James Accardi testified that he was aware that the victim had contracted gonorrhea shortly after the incident occurred. Mr. Accardi had been informed of this by Detective James Parker, and Accardi had

seen the hospital emergency room report which was completed the night of the rape. Accardi was also concerned about the results of the test conducted on appellant and maintained contact with Parker on this subject. Parker subsequently informed Accardi that appellant's test was negative. Accardi stated that Parker explained to appellant the reasons why he was being tested. Accardi admitted that he never discussed this information with defense counsel because he "expected the defense to access to it."

Detective Parker testified that he learned the victim had contracted gonorrhea and that he talked with appellant about being tested. Parker testified that he spoke with appellant and appellant's attorney, Mr. Mark

McDaniel, about the need for appellant to be tested. (Mr. McDaniel did not represent appellant at trial and did not testify at the hearing.) Parker stated:

"We explained to Mark McDaniel and also Mark Geeslin about the tests that we were going to need. We were going to need blood samples, hair samples, saliva samples, and a test for gonorrhea. Mr. McDaniel advised myself, along with Sergeant Thompson, that he had told Mark Geeslin to cooperate with us, that all we would need would be a court order to obtain those things and, therefore, he was going to cooperate."

On cross-examination, Parker testified as follows:

"Q. Mr. Parker, did you have a conversation with Mark when you took him down for the test about the test and why you were doing it?

"A. Yes, sir, I did.

"Q. Would you tell the jury [sic] what you informed him at that time?

"A. I advised him that the victim had contracted the disease and that we were asking him to submit to a test to see if, in fact, he had this disease.

"Q. Did he indicate that he understood that procedure to you?

"A. Yes, sir, he did.

"Q. What did he tell you about it?

"A. He said, well good, I will take the test, and if I haven't got it, that will mean I am innocent. I wasn't involved in it.

"Q. Did you observe the procedure conducted?

"A. I did.

"Q. Were you present when the procedure was conducted?

"A. Yes, sir, I was."

Appellant testified that he was told by one of the detectives that he would be subjected to blood, hair, and semen samples, but he was not told what the

tests were specifically for. Appellant was never informed of the results of these tests. According to appellant he was not aware that he had been tested for gonorrhea until he explained the procedure to another inmate, who told him what test had been performed.

The trial court denied appellant's motion for new trial, stating:

"The Court has considered the motion grounds and the evidence presented as well as the brief submitted. The Court notes that the State failed to comply with the Court's order to provide the defendant, prior to trial, with all exculpatory evidence in the State's possession. The Court observed that there is clear and convincing evidence to establish that the defendant was aware, prior to trial, of the existence of the evidence which he asserts was not disclosed by the State. Based upon that this Court finds that the State's compliance with the order of disclosure was in good faith and totally adequate. The Court finds no other ground supported in law or fact."

Appellant argues that Brady, supra, requires the State to disclose the fact of the victim's contracting gonorrhea and the fact that appellant's test results were negative. In order to establish a Brady violation the appellant must prove: "(1) The prosecution's suppression of evidence; (2) the favorable character of the suppressed evidence for the defense; (3) the materiality of the suppressed evidence." Moore v. Blackburn, 607 F.2d 148, 150 (5th Cir. 1979); Knight v. State, [Ms. 5 Div. 887, October 8, 1985] \_\_\_\_ So.2d \_\_\_\_ (Ala.Crim.App. 1985). "The heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment." Moore v. Illinois, 408 U.S. 786, 794 (1972).

The trial court clearly found the element of "suppression" missing from appellant's proof. There was conflicting evidence presented as to appellant's knowledge of being tested for gonorrhea because the victim had contacted gonorrhea. Obviously, the trial judge believed Officer Parker. Any conflict in the evidence was for the trial court to resolve, and his ruling will not be disturbed absent a showing of abuse of discretion.

The term suppression "means non-disclosure of evidence that the prosecutor, and not the defense attorney, knew to be in existence." Ogden v. Wolff, 522 F.2d 816, 820 (8th Cir. 1975). "The concept of 'suppression' implies that the Government has information in its possession of which the defendant

lacks knowledge and which the defendant would benefit from knowing." United States v. Natale, 526 F.2d 1160, 1170 (2d Cir. 1975). "Evidence is not 'suppressed' if the defendant either knew ... or should have known ... of the essential facts permitting him to take advantage of exculpatory evidence." United States v. LeRoy, 687 F.2d 610, 618 (2d Cir. 1982). "There could be no suppression by the state of evidence already known by and available to [the defendnt] prior to trial." DeBerry v. Wolff, 513 F.2d 1336, 1340 (8th Cir. 1975).

In United States v. Brown, 582 F.2d 197, 200 (2d Cir. 1978), the Court stated:

"Under Brady, the Government may not withhold material exculpatory evidence specifically requested by the defense ....

However, where the defendant is aware of the essential facts enabling him to take advantage of any exculpatory evidence, the Government does not commit a Brady violation by not bringing the evidence to the attention of the defense."

See also United States v. Ruggiero, 472 F.2d 599 (2d Cir. 1973); United States v. Stewart, 513 F.2d 957 (2d Cir. 1975); United States v. Robinson, 560 F.2d 507 (2d Cir. 1977); Pina v. Henderson, 752 F.2d 47 (2d Cir. 1985). We agree with the propositions expressed by the above cited cases. The State is not required to make information known to a defendant who is on notice of the essential facts which would enable him to take advantage of any exculpatory evidence that may be present. There can be no suppression where the defendant has knowledge of the facts allegedly suppressed.

In the case at bar, appellant was

obviously aware that certain tests had been conducted by the State. Parker testified that he specifically told appellant why he was being tested and that he was being tested for gonorrhea. The results of this test could easily have been obtained by appellant from the State lab. Appellant was on notice of the essential facts which would have enabled him to take advantage of the gonorrhea test conducted by the State. The State, therefore, cannot be said to have suppressed this evidence.

"The purpose of the Brady rule is not to provide a defendant with a complete disclosure of all evidence in the government's file which might conceivably assist him in preparation of his defense, but to assure that he will not be denied access to exculpatory evidence known to the government but unknown to him."

Ruggiero, 474 F.2d at 604. Because the

information was known to appellant, his arguments that reversal is required under Brady; A.R.Crim.P.Temp. 18.1(d); or the theory of newly discovered evidence, are without merit. We find no abuse of discretion in the trial court's denial of appellant's motion for a new trial.

## II

Appellant next contends that the trial court's limiting closing arguments to forty-five minutes per side violated his constitutional right to a fair trial. Appellant maintains that due to the length of the trial (two days) and the number of witnesses (twenty-one), more time should have been allotted for closing arguments.

In Smith v. State, 364 So.2d 1, 13 (Ala.Crim.App. 1978), this court stated:

"Much discretion is allowed the trial court in respect to limiting arguments of counsel, and in the absence of some abuse of that discretion, no error exists." We find no abuse of discretion in the case at bar. This cause was not extermely complex and many of the witnesses presented cumulative and repetitive testimony. No error was committed by the trial court's limiting closing arguments to forty-five minutes per side.

Based on the foregoing, this case is due to be, and is hereby, affirmed.

— AFFIRMED.

ALL THE JUDGES CONCUR.

APPENDIX "B"

November 7, 1986

THE STATE OF ALABAMA - - - - -  
JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1986-87

85-566 Ex parte: Mark Monroe Geeslin

(In re: Mark Monroe Geeslin v. State)

PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF CRIMINAL APPEALS

ALMON, JUSTICE.

This Court granted a petition for writ of certiorari in this case because it appeared that the judgment of the Court of Criminal Appeals was based upon an incorrect application of the principle of Brady v. Maryland, 373 U.S. 83 (1963). Mark Monroe Geeslin was convicted of

kidnapping and rape. He contends that he was denied his right to a fair trial and to due process of law by the prosecutor's failure to produce an exculpatory medical report even though he requested production of all such reports. The Court of Criminal Appeals affirmed, holding that there was no suppression of evidence because Geeslin "was on notice of the essential facts."

A standard rape examination was performed on the victim shortly after the rape, including a vaginal smear. This smear showed the presence of sperm carrying gonorrhea. Twelve days after the rape, a police officer took Geeslin to the Madison County Health Department, where he submitted hair, saliva, blood, and semen samples for testing. Although there was evidence from which the trial

court found that Geeslin was told that his semen sample was being taken for a gonorrhea test and that the victim had contracted gonorrhea from the rape, there was not evidence that Geeslin was told that a semen sample from the victim indicated gonorrhea or that his test proved negative. Geeslin testified that he was not told that the semen sample was tested for gonorrhea and that the thought all of the test were routine. It is undisputed that the prosecutor did not tell Geeslin's counsel anything about the sperm tests or the gonorrhea.

Geeslin's counsel filed a motion requesting the court to order the district attorney to, among other things,

"Permit the defendant to inspect and copy any results or reports of physical or mental examinations or scientific

tests or experiments, if the examinations, tests, or experiments were made in connection with this case and the results or reports are within the possession, custody or control of the State or if their existence is known to the District Attorney."

This language tracks that of Temporary Rule 18.1(d), Ala. R. Crim. P. The trial judge wrote on this motion, "Granted insofar as the State is capable of compliance." On January 10, 1985, James Accardi, the assistant district attorney in charge of the case, submitted a response stating, in pertinent part: "Only test known to State at this time was that performed by State Department of Forensic Science on hair, saliva, etc."

Accardi admitted at the hearing on the motion for new trial that he knew in October or November of 1984 about the semen sample from the victim testing

positive and that he had subpoenaed the hospital emergency room report showing this fact. He did not produce this report in response to the order.

The trial began on January 30, 1985. Prior to that time, Accardi learned that Geeslin's test had proved negative for gonorrhea. Accardi testified that he learned this "two or three weeks, or maybe a month," after he learned about the positive results from the rape sample. This indicates that he knew of it well before he filed the response to the motion for production. After he learned of the result of Geeslin's test, he prepared expert testimony indicating that the negative result could have been affected by antibiotics taken by Geeslin during the time between the rape and his test. The record does not show that

Geeslin did in fact take any such antibiotics. The State's expert testified that tests on Geeslin's blood sample taken at the same time as the semen sample could have shown whether Geeslin had taken antibiotics, but the State did not order such tests. The county health department preserved the blood sample until the trial, but no longer had it at the time of the hearing on the motion for new trial.

Geeslin's attorney discovered the facts about the gonorrhea tests about two weeks after trial and filed a motion for new trial on the ground, inter alia, that the State had failed to comply with the pre-trial order for production of exculpatory matter known to the State. At the hearing on this motion, Accardi testified that he did not mention this

test conducted by the county health department because he "expected the defense had access to it" because "the defendant himself was told why the test was being performed." The police officer who took Geeslin to the health department testified that he told him what the test was and why it was being conducted. The trial court accepted this explanation and denied the motion. The Court of Criminal Appeals affirmed.

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held:

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

The Court went on to observe:

"The principle of Mooney v. Holohan[, 294 U.S. 103 (1935),] is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."

Id. In a footnote, the Court quoted a remark by a former solicitor general that the state's "chief business is not to achieve victory but to establish justice." Id., n. 2.

Brady is not the only source of this rule -- the opinion itself refers to prior cases -- but it is so generally cited that a suppression is often referred to as a Brady violation. Cf. Powell v. Wiman, 287 F.2d 275 (5th Cir. 1961); Wiman v. Powell, 293 F.2d 605 (5th Cir. 1961).

One of the developements of the line of cases on this issue is the position that there is no "suppression" if the defendant is aware of the exculpatory evidence. The Court of Criminal Appeals cited a number of cases generally standing for this proposition. Another proposition is that, where the defendant makes no request or only a general request, the defendant has a higher burden of showing the materiality or probative value of the evidence before a failure to produce will warrant a new trial. United States v. Agurs, 427 U.S. 97 (1976); cf. United States v. Bagley, \_\_\_ U.S. \_\_\_, 105 S. Ct. 3375 (1985).

Without deciding whether the prosecutor's duty to produce exculpatory evidence upon a specific motion is obviated where the defendant and his

counsel have incontrovertible knowledge of the evidence, we hold that the trial court and the Court of Criminal Appeals erred in holding that the district attorney's failure to produce or inform the defense of the report was not a "suppression" on the ground of a finding, based on controverted testimony of the district attorney and a police officer, that the defendant was aware of facts which should have led him to discover the test results.

At the time the sample was taken from Geeslin, he was not represented by the lawyer who later made the motion for production, who represented Geeslin at trial, and who, in fact, was the only counsel of record throughout the proceedings below. There is some indication that another attorney

represented Geeslin at his arrest and for a short time thereafter, and that that attorney instructed Geeslin to cooperate with the police in obtaining samples. There is no indication, however, that the police told that attorney of the gonorrhea test or the reason for it, and they could not have given him the results, which were only obtained later.

Certainly, when Geeslin's trial counsel made the motion for production, Accardi had no indication that the attorney knew of the positive gonorrhea culture from the victim or of the test conducted on Geeslin or the results of that test. Accardi admitted that he had several discussions with the attorney about the motion to produce, but he never mentioned this evidence, which he considered so important he went to

condiserable effort to develop rebuttal evidence against it. Accardi communicated frequently with the employees at the county health department who conducted the test and he could very easily have asked if Geeslin had obtained the test results. Under these circumstances, and especially in view of the significant potention effect of the evidence on the jury's determination of guilt or innocence, we find that Accardi was not justified in withholding the information on the assumption that Geeslin and his attorney were so cognizant of the test and its purpose that they would certainly have discovered the test results on their own.

Because the assistant district attorney's failure to comply with the motion to produce exculpatory evidence

adversely affected the fundamental fairness of Geeslin's trial, Geeslin was denied his right not to be deprived of liberty without due process of law. U. S. Const., amend. XIV; Const. of 1901, § 6. Therefore, the Court of Criminal Appeals erred in affirming the trial court's denial of Geeslin's motion for new trial. The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

All the Justices concur.

December 5, 1986

THE STATE OF ALABAMA - - - - -  
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

85-566

EX PARTE: MARK MONROE GEESLIN  
PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF CRIMINAL APPEALS  
(Re: Mark Monroe Geeslin v. State)

Application for rehearing overruled.  
No opinion written on rehearing.  
Per Curiam - All the Justices  
concur.

APPENDIX "C"

January 13, 1987

THE STATE OF ALABAMA ---  
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1986-87

8 Div. 306

Mark Monroe Geeslin

v.

State

Appeal from Madison Circuit Court

PATTESON, JUDGE

Reversed and remanded for a new  
trial on authority of Ex parte Mark  
Monroe Geeslin, Alabama Supreme Court  
85-566, November 7, 1986, \_\_\_ So.2d \_\_\_  
(Ala. 1986).

REVERSED AND REMANDED.

ALL JUDGES CONCUR.

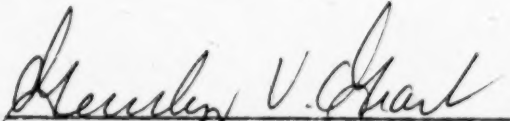
CERTIFICATE OF SERVICE

I, Gerrilyn V. Grant, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, hereby certify that on this 11<sup>th</sup> day of March, 1987, I did serve the requisite number of copies of the foregoing on the Attorneys for Mark Monroe Geeslin, Petitioner, by mailing the same to them first-class postage prepaid and addressed as follows:

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